Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

MARY CHRISTINE O'CONNOR,

Petitioner,

– against –

CHURCH OF ST. IGNATIUS LOYOLA
and REV. WALTER MODRYS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the ministerial exception to claims for employment discrimination protect a religious organization from liability for its employment decision where the decision was not rooted in religious belief or doctrine?

PARTIES TO THE PROCEEDING

Petitioner is Mary Christine O'Connor.

Respondents are Church of Saint Ignatius Loyola and Reverend Walter Modrys.

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BASIS FOR JURISDICTION

Petitioner seeks a writ of certiorari to review the decision of the Appellate Division of the Supreme Court of New York, First Department in this case (779 N.Y.S.2d 31, 8 A.D.3d 125) (App-3). By Order dated October 19, 2004 (2004 N.Y. LEXIS 2452) (App-5), the New York State Court of Appeals denied Petitioner's motion for leave to appeal the decision of the Appellate Division. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Petitioner filed an action in the Supreme Court of the State of New York, New York County, to remedy discrimination on the basis of her sex and disability in the terms, conditions and privileges of her employment with Respondent, Church of Saint Ignatius Loyola, in violation of Chapter I, Title 8 of the Administrative Code of the City of New York § 8-101 et seq. On motion by the defendants, Church of Saint Ignatius Loyola and Reverend Walter Modrys, for summary judgment, the trial court found that "the First Amendment's prohibition against entanglement in church policy" rendered Petitioner's claims "not actionable."

STATEMENT OF THE CASE

A. *Petitioner's Claims*

Petitioner, Mary Christine O'Connor, began her employment with Church of St. Ignatius Loyola in 1987 as a Pastoral Associate and Chaplain. In January 1996, when Petitioner informed Respondents of her pregnancy and pregnancy related illness, Petitioner's supervisor, Reverend Walter Modrys, began to treat her in a hostile and discriminatory manner. Petitioner endured Reverend Modrys' discriminatory remarks and suffered disparate treatment, including undue criticism of her work, and a *de facto* demotion. Despite her complaints

to Church officials, Reverend Modrys' treatment continued and, in November 2000, Petitioner was forced to leave her employment with the Church.

To redress the deprivation of her civil rights, Petitioner filed a lawsuit under the Administrative Code of the City of New York for sex and disability discrimination and constructive discharge.

B. *Facts Presented Below*

In the New York County Supreme Court, Petitioner's memorandum of law in opposition to the defendants' motion for summary judgment pointed to the secular and administrative nature of Petitioner's job by citing the record established during discovery:

> From the beginning of her employment in September 1987, Mrs. O'Connor's primary duties for the Church of St. Ignatius Loyola included coordinating the music for the 7:30 evening mass — a real prime responsibility for her. Mrs. O'Connor organized events and did work at home such as phone calls, preparation for retreats, office work. Even in connection with her seemingly religious title of "chaplain," Mrs. O'Connor would work with the teachers, music personnel and the students to organize masses, prayer services, retreats, sacraments, and any other prayer event; she would also be a resource for the parents in assisting the families in the above celebrations. With respect to mass, as well, much of her job was administrative.

These job duties and responsibilities remained the same for Petitioner, a lay employee, until January 1999 when she returned from maternity leave after the birth of her second child. After she returned, as a further act of discrimination, Reverend Modrys stripped Petitioner of her office, and most of her duties as Associate Pastor and Chaplain.

In support of their motion for summary judgment, Respondents argued that Petitioner's claims are barred for lack of subject matter jurisdiction. In their initial brief, Respondents cited deposition testimony that described Petitioner's role as Associate Pastor and Chaplain. Respondents' argument rested on disputed facts that described Petitioner's duties as spiritual and pastoral in nature. According to Respondents, those facts alone required the application of the ministerial exception to the claims in this action. However, even assuming, *arguendo*, that Petitioner's job duties were spiritual and pastoral in nature, the record below establishes that the harassment that Petitioner suffered was not related to (nor does it require this Court to evaluate) religious doctrine or policy.

Beginning in January 1996, after she informed church officials of her pregnancy, Petitioner was subjected to harassment and discrimination on the basis of her sex and pregnancy. Specifically, Petitioner endured Reverend Walter Modrys' discriminatory remarks and treatment. Petitioner's memorandum of law in opposition to the defendants' motion for summary judgment cited to the record established during discovery wherein, in June 1996, a member of the Church's congregation called Petitioner a "barren bitch." The record shows that Petitioner informed Reverend Modrys of the incident, and he replied, in the presence of others, that the parishioner "was only half right." Reverend Modrys then repeated the comment to the Church's music director in Petitioner's presence.

As further evidence of discriminatory treatment, the record shows that when Petitioner received only a $100.00 Christmas gift from the Church, as compared to the $200.00 she had received as a Christmas gift prior to her pregnancy, Reverend Modrys told her that the Church "had done enough for [her]" — referring to the alleged costs the Church had incurred because of Petitioner's pregnancy.

Petitioner complained to Church officials about the discrimination she suffered, but her complaints were ignored. After Petitioner returned from maternity leave (after the birth of her second child) in January 1999, Reverend Modrys told her that he "[did] not think that [she] could do [her] job with two children" and subsequently stripped her of her office and most of her duties.

C. *The New York Supreme Court's Decision*

The trial court accepted Respondents' argument, and decided a disputed and material issue of fact against Petitioner — robbing her of her right to a jury trial. By Order and Judgment dated July 31, 2003 (App-1), the New York County Supreme Court granted summary judgment in favor of Respondents and dismissed Petitioner's claims. The decision merely stated that "the Human Rights Law shall not be construed to bar any religious institution from limiting employment to promote the religious principles for which it is established." (App-2)

D. *The Appellate Division's Summary Order*

Similarly, the Appellate Division's order affirming the trial court's decision did not even proffer a rule of law on which the Court based its decision, and merely cited case law from three different circuits. The Court determined that because Petitioner was a "pastoral associate and chaplain whose primary function served the spiritual and pastoral mission of the church . . . [the Court's] [i]nterference . . . would violate the Free Exercise Clause of the First Amendment." (App-3)

REASONS FOR GRANTING THE WRIT

A. *Introduction*

Supreme Court Rule 10(b) states that it is within this Court's discretion to grant a writ of certiorari where a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals.

In affirming the trial court's decision on summary judgment in favor of Respondents, the New York State Appellate Division held that evaluation of Petitioner's claims of harassment and discrimination in the terms, conditions and privileges of her employment on the basis of her sex and pregnancy would "violate the Free Exercise Clause of the First Amendment, under the 'ministerial exception' to employment discrimination claims." (App-3) However, recent decisions from the Ninth Circuit Court of Appeals — on point with the facts of this case —- are directly contrary to the holding of the Appellate Division herein.

In *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), and *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), the Ninth Circuit found that the ministerial exception *does not* foreclose a plaintiff's sexual harassment claim where the questions posed by the suit do not require interpretations of religious doctrine or scrutiny of the defendant's ministerial choices. *Elvig*, 375 F.3d at 964 (emphasis added).

B. *The application of Title VII to the case at bar does not violate the Free Exercise Clause*

Where First Amendment values are plainly jeopardized by Title VII's reach into the employment decisions of a church regarding its ministers, the ministerial exception applies to reconcile the statute with the Constitution. *Bollard*, 196 F.3d at 946. However, the scope of the ministerial exception is

limited to what is necessary to comply with the First Amendment. *Id.* Claims brought by lay employees of a religious institution, where the religious interests of the church are not to be evaluated, are constitutionally permissible and, therefore, not barred by the ministerial exception to Title VII. *See id.*

While the First Amendment protects a church's employment decisions regarding its ministers, the decision to sexually harass is not a protected personnel decision. *See Bollard,* 196 F.3d at 946-47. Like *Bollard*, this is not a case where the Church's choice of representative is questioned. Here, Petitioner has not questioned the Church's decision to terminate her, as it was not her discharge, but her decision to leave that supports her claim. *See id*, 196 F.3d at 947 (constructive discharge in the context of a sexual harassment claim serves to demonstrate the severity of the harassment suffered). Accordingly, the ministerial exception will not apply to insulate the Church from vicarious liability for the acts of harassment alleged by Petitioner herein.

As established by the Ninth Circuit in *Bollard* and *Elvig*, whether a plaintiff can carry her burden of proving that she was sexually harassed, and whether the defendants can prove their affirmative defense, is a restricted and secular inquiry. *See Elvig*, 375 F.3d at 963.

Where, as is the case here, the Church has pled no religious justification for the harassment Petitioner alleges, nor offered any doctrinal reason for "tolerating or failing to stop" it, the ministerial exception does provide a cloak to shield the Church from liability for clear instances of sexual harassment. *See Elvig*, 375 F.3d at 962-63. Reverend Modrys' decision to harass Petitioner and the Church's decision not to intervene or stop the reported conduct, are insufficient to trigger the protection of the ministerial exception. *See id.*

C. *Enforcement of Title VII in the instant case will not violate the Entanglement Clause*

Another basis for applying the ministerial exception to claims brought against religious institutions under Title VII is if the statute violates the Establishment Clause.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I. There is a "three-part test to determine whether Title VII violates the Establishment Clause: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Bollard*, 196 F.3d at 948, *citing Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971) (internal quotation marks omitted). Since the court has "already held that Title VII has an obvious secular and legislative purpose, and its principal effect neither advances or inhibits religion, the only remaining question is whether applying Title VII in this case would foster an impermissible government entanglement with religion."

Applying Title VII to the clergy-church employment relationship, where the church's freedom to choose its ministers is at stake, constitutes an impermissible government entanglement with religion. *See Bollard*, 196 F.3d at 948-49. However, as stated above, Respondents have not offered a religious justification for the discrimination and harassment Petitioner suffered, and Petitioner's claims do not implicate the Church's choice of representative. *See Elvig,* 375 F.3d at 956. Therefore, Petitioner's suit does not "impermissibly promote substantive entanglement between church and state." *Elvig,* 375 F.3d at 957, *citing Bollard,* 196 F.3d at 949.

Further, although entanglement may also result in the case of a "protracted legal process" between church and state, Title VII cases create only an "acute" procedural entanglement issue. *See Bollard*, 196 F.3d at 949. The "restricted inquiry" into, (1) whether or not Petitioner suffered harassment, (2) the severity of the conduct, and (3) the measures taken to correct it, does not constitute an "intrusion into sensitive religious matters" and the application of Title VII to the facts of this case does not violate the Establishment Clause. *See Bollard*, 196 F.3d at 950.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

----------X

MARY CHRISTINE O'CONNOR,

Plaintiff,

-against-

Index No.
0119024/01

CHURCH OF ST. IGNATIUS LOYOLA
and REV. WALTER MOODRYS,

Defendants.

----------X

DeGrasse, J.:

Defendants move for summary judgment. This action has been brought to recover damages for discrimination in employment on the basis of gender and disability in violation of the New York City Human Rights Law (Administrative Code of the City of New York § 8-107). Plaintiff's employment by defendant Church of St. Ignatius Loyola began in 1987. It is alleged in the complaint that in 1996 the Church's Pastor, defendant Rev. Walter Moodrys, treated her in a discriminatory manner by reason of her pregnancy. The complained of treatment consisted of remarks and a reduction of plaintiff's annual Christmas gift from $200 to $100. In February 1998, plaintiff became pregnant again and contracted hypermesis, an illness related to the pregnancy. It is alleged in the complaint that during her illness and absence from work plaintiff was not visited or sent flowers as other church employees had been during their non-pregnancy related illnesses.

Plaintiff alleges that upon her return to work on May 19, 1998, Rev. Moodrys complained about the quality of her work and the amount of money she cost the Church while out on disability. In October 1998, Moodrys allegedly told

plaintiff that he did not think she could do her job because she had two children. In the spring 2000, plaintiff was demoted and stripped of most of her duties including her responsibilities as Chaplain. The said duties included developing monthly liturgies and serving as Cantor during services. Plaintiff claims to have been forced to leave the Church's employ in November 2000 based upon the aforementioned treatment. Plaintiff filed a complaint with the New York State Division of Human Rights (SDHR) on May 10, 2001.

Administrative Code § 8-502(d) requires that actions brought under the Human Rights Law be commenced within three years after the alleged unlawful discriminatory practice or act of discrimination has occurred. The said statute of limitations is tolled upon the filing and during the pendency of a complaint with SDHR. This action was commenced on October 12, 2001. Therefore, plaintiff's claims which accrued before May 10, 1998 are time-barred. The continuing violation exception does not apply because the conduct complained of consisted of discrete acts (*see Elenmayer v ABF Freight Sys.*, 318 F3d 130). Administrative Code § 8-107(12) provides that the Human Rights Law shall not be construed to bar any religious institution from limiting employment to promote their religious principles for which it is established. The statute embodies of the First Amendment's prohibition against entanglement in church policy (*see e.g. Alicea-Hernandez v the Catholic Bishop of Chicago*, 320F3d 698). Accordingly, plaintiff's claims based upon her demotion and discharge are not actionable. In all other respects, plaintiff's allegations are insufficient to establish a prima facie case of discrimination. Accordingly, defendants' motion for summary judgment is granted. The Clerk shall enter judgment dismissing the complaint.

Dated: July 16, 2003

/s/

J.S.C.

Buckley, P.J., Nardelli, Andrias, Williams, Gonzalez, JJ.

3925 Mary Christine O'Connor,

Plaintiff-Appellant,

-against-

Church of St. Ignatius Loyola, et al.,

Defendants-Respondents.

Rosen, Leff, Esqs., Hempstead (David M. Fish of counsel), for appellant.

Jackson Lewis LLP, White Plains (Daniel V. Duff III of counsel), for respondents.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered July 31, 2003, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly determined that it lacked subject matter jurisdiction over these causes of action. Plaintiff was a pastoral associate and chaplain whose primary function served the spiritual and pastoral mission of the church. Interference with this mission would violate the Free Exercise Clause of the First Amendment, under the "ministerial exception" to employment discrimination claims (*Equal Empl. Opportunity Comm. v Catholic Univ. of Am.*, 83 F3d 455 [DC Cir]; *Rayburn v General Conference of Seventh-Day Adventists*, 772 F2d 1164 [4th Cir], *cert denied* 478 US 1020; *Kraft v Grace Church*, 2004 US Dist LEXIS 4234 [SDNY]). Accordingly, we need not reach plaintiff's remaining contentions.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 17, 2004

/s/ Catherine O'Hagan Wolfe
CLERK

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of October 2004

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 752

Mary Christine O'Connor,

Appellant,

v.

Church of St. Ignatius Loyola, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

(2)

No. 04-1024

IN THE

Supreme Court of the United States

MARY CHRISTINE O'CONNOR,

Petitioner,

v.

CHURCH OF ST. IGNATIUS LOYOLA and
REV. WALTER MODRYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT, STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the ministerial exception to claims for employment discrimination protect a religious organization from liability for its employment decision where the decision was not rooted in religious belief or doctrine?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Church of St. Ignatius Loyola is not a corporation, has no stock and does not have a parent corporation.

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STATEMENT OF THE CASE

A. Procedural History Of The Case[1] And The Nature of Petitioner O'Connor's Claims For Pregnancy-Based Sex and Disability Discrimination Under The New York City Human Rights Law, New York City Charter and Administrative Code, Title VIII, § 8-107 *et seq.*

On or about October 12, 2001, Petitioner Mary Christine O'Connor (hereinafter "Petitioner O'Connor") commenced a New York State court action by filing a Verified Complaint with the Supreme Court of the State of New York, County of New York (hereinafter "New York Supreme Court"). Petitioner O'Connor's Verified Complaint asserted causes of action against Respondents Church of St. Ignatius Loyola and Rev. Walter Modrys under the New York City Human Rights Law, New York City Charter and Administrative Code, Title VIII, § 8-107 *et seq.* (hereinafter "NYCHRL")[2] for

[1] Respondents provide this procedural history because Petitioner O'Connor has not adequately complied with Rule 14(1)(g) of the Supreme Court of the United States, which provides in pertinent part that a petition for certiorari seeking a review of a state court judgment shall contain: (1) "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised;" and (2) "the method or manner of raising them and the way in which they were passed on by those courts . . . so as to show that the federal question was timely and properly raised and that this court has jurisdiction to review the judgment on a writ of certiorari." Rule 14(1)(g).

[2] Despite repeated references to "Title VII" in her Petition For Writ Of Certiorari, Petitioner O'Connor has never brought any civil action against Respondents pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

pregnancy-based sex discrimination and pregnancy-based disability discrimination. The alleged discriminatory employment decisions set forth in Verified Complaint include: (1) Respondent Modrys' decision to remove Petitioner O'Connor of her job title and job responsibilities as Chaplain, and (2) Respondent Modrys' decision to remove Plaintiff from her office on the second floor of the rectory and give it to a new full-time priest at the parish. Plaintiff also alleges she was constructively discharged as a result of such alleged discriminatory employment decisions.

On or about December 14, 2001, Respondents filed their Answer to Petitioner O'Connor's Verified Complaint, denying the material allegations in the Verified Complaint and asserting various affirmative defenses.

On or about April 29, 2003, Respondents moved the New York Supreme Court for an Order pursuant to Rule 3212 of the New York Civil Practice Law and Rules granting summary judgment and dismissing the Verified Complaint in its entirety. In their motion, Respondents argued that: (1) the court lacked subject matter jurisdiction over Petitioner O'Connor's causes of action pursuant to the ministerial exception of the Free Exercise and Establishment Clauses of the First Amendment of the U.S. Constitution and Article One, Section Three of the New York State Constitution; (2) Plaintiff's allegations of alleged unlawful activity occurring prior to May 10, 1998 were time-barred pursuant to the three-year limitations period established by Section 8-502(d) of the NYCHRL; and (3) Plaintiff could not establish a *prima facie* case of alleged pregnancy-based sex and disability discrimination as a matter of law.

On or about May 12, 2003, Petitioner O'Connor filed a Memorandum Of Law In Opposition To Defendants' Motion For Summary Judgment (hereinafter "Opposition Memorandum"). In her Opposition Memorandum, Petitioner O'Connor argued that the ministerial exception did not apply to her claims of discrimination because "her position, for the most part, was administrative." However, Petitioner O'Connor did not cite in her Opposition Memorandum to the Ninth's Circuit decision in *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999) or to any of the other cases she has cited in support of her Petition For Writ Of Certiorari.

By Decision and Order dated July 16, 2003, the New York Supreme Court granted the Respondents' motion and dismissed the Verified Complaint in its entirety. (The Decision and Order is reprinted in Petitioner O'Connor's Appendix [hereinafter "Pet. App."] at A-1 to A-2.) The New York Supreme Court determined that the ministerial exception deprived the court of jurisdiction over Petitioner O'Connor's demotion and discharge claims, *but also found that Appellant's allegations were "insufficient to establish a prima facie case of discrimination.*" In addition, the court ruled that Petitioner O'Connor's allegations occurring prior to May 10, 1998 were time-barred by the three-year statute of limitations set forth in NYCHRL § 8-502(d). (Pet. App. at A-2). Pursuant to this ruling, a number of allegations made by Petitioner O'Connor in her Verified Complaint were found to be time-barred, including: (1) that in June 1996 a member of the Church's congregation called Petitioner O'Connor a "barren bitch," and Respondent Modrys replied that the person was "only half right;" and (2) that in December 1996, Plaintiff received a $100 Christmas gift from Respondent Church of St. Ignatius Loyola, as

compared to the $200 Christmas gift she had received prior to her pregnancy, and that Father Modrys told Petitioner O'Connor that "the Church had done enough for her." Accordingly, Respondents object to Petitioner O'Connor's citation to these time-barred allegations on pg. 3 of her Petition For Writ Of Certiorari.[3]

On or about August 4, 2003, Petitioner O'Connor filed a Notice of Appeal with New York State's intermediate appellate court – the Supreme Court of the State of New York, Appellate Division, First Department (hereinafter "Appellate Division"). In Petitioner O'Connor's Reply Brief to the Appellate Division, Petitioner O'Connor argued that the ministerial exception did not apply in this case because "the true nature of Mrs. O'Connor's position was administrative and organizational." Petitioner O'Connor also argued that the ministerial exception did not apply since "there is absolutely nothing in this case that relates to issues of interpretation or application or religious or Canon Law." No further arguments were advanced by Petitioner O'Connor in support of her contention that the ministerial exception did not apply to her claims. Once again, Petitioner O'Connor did not cite to *Bollard* or any of the other cases she has relied upon in support of her Petition For Writ Of Certiorari.

After submission of briefs and oral argument by counsel for all parties, the Appellate Division unanimously affirmed the New York Supreme Court's July 16, 2003 Decision and Order dismissing Petitioner O'Connor's Verified Complaint.

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[3] Petitioner O'Connor has not asked this Court to review the New York State Supreme Court's holdings that: (1) her allegations were insufficient to establish a *prima facie* case of discrimination; or (2) that her allegations occurring prior to May 10, 1998 were time-barred.

In its June 17, 2004 Decision and Order, the Appellate Division held that the New York Supreme Court properly determined that it lacked subject matter jurisdiction over Petitioner O'Connor's causes of action pursuant to the ministerial exception of the Free Exercise Clause of the First Amendment. *See O'Connor v. Church of St. Ignatius Loyola*, 779 N.Y.S.2d 31 (1st Dep't 2004) (reprinted at Pet. App. at A-3 to A-4).

On or about July 16, 2004, Petitioner O'Connor filed a Motion For Leave To Appeal with the New York State Court Of Appeals. The question presented by Petitioner O'Connor's motion was "[d]oes the ministerial exception apply, where an employee alleges unlawful discrimination by a religious institution, where such alleged discriminatory conduct is not rooted in religious belief or conduct." No other issue was presented by Petitioner O'Connor to the New York State Court of Appeals for consideration. Once again, Petitioner O'Connor did not cite to *Bollard* or any of the cases she has cited in her Petition For Writ of Certiorari.

By letter to the Clerk of the New York Court of Appeals dated August 6, 2004, Petitioner cited to *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), a case which was decided after Petitioner O'Connor filed her motion for leave to appeal. Petitioner O'Connor stated in the letter that the case was relevant to "whether courts of the State of New York have jurisdiction over the claims of discrimination and harassment, asserted by [Petitioner O'Connor], a *non-ordained and secular employee*, against her employer, Church of St, Ignatius Loyola." (Emphasis in original). Petitioner O'Connor cited no other basis for her contention that *Elvig* was relevant to her claims.

On October 19, 2004, the New York State Court of Appeals denied Petitioner O'Connor's motion for leave to appeal. (Pet. App. at A-5). Significantly, the New York State Court of Appeals did not affirm or otherwise render any opinion on the merits of the Appellate Division's June 17, 2004 Decision And Order affirming New York Supreme Court's July 16, 2003 Decision And Order granting Respondents' motion for summary judgment.

B. The Spiritual And Pastoral Nature Of Petitioner O'Connor's Job Duties As A Chaplain, Cantor and Pastoral Associate For Respondent Church Of St. Ignatius Loyola.

In her Petition For Writ Of Certiorari at page 2, Petitioner O'Connor states that her "memorandum of law in opposition to defendants' motion for summary judgment pointed to the secular and administrative nature of Plaintiff's job." It is unclear whether Petitioner O'Connor still considers the nature of her job duties as relevant to the question presented in her Petition For Writ Of Certiorari. For the purpose of clarifying the record, Respondent notes that the Appellate Division found that "Plaintiff was a pastoral associate and chaplain whose primary function served the spiritual and pastoral mission of the church." (Pet. App. at A-3). This finding was supported by Respondents' detailed submissions to both the New York Supreme Court and the Appellate Division summarizing Petitioner O'Connor's own deposition testimony, which overwhelmingly established the spiritual and pastoral nature of her positions as Chaplain, Cantor and Pastoral Associate.[4]

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[4] For example, with respect to her Cantor responsibilities, Petitioner O'Connor testified that "being the Cantor is more than

(Cont'd)

To the extent Petitioner O'Connor asks this Court to review the Appellate Division's findings of fact concerning the spiritual and pastoral nature of Petitioner O'Connor's job duties, the Petition should be denied. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue."); *see also* Rule 10 of the Supreme Court of the United States ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

(Cont'd)

being a singer in my position, as a pastoral person. It is a very important presence. I was the only woman on the altar at that time." In addition, Petitioner O'Connor testified that during her employment with Respondent Church of St. Ignatius Loyola, her duties as Pastoral Associate, Cantor and School Chaplain focused on spiritual development and oversight of liturgical programs including: (1) serving as a liaison with the school, leading the music and coordinating the entire service with volunteers for lectors, readers and Eucharistic Ministers for the 7:30 mass; (2) developing and leading a prayer group, women's ministry and a liturgical program for the parochial school; (3) developing monthly liturgies, prayer services, Bible study, devotions and retreats for the school faculty; (4) developing and leading the retreat ministry, in which she coordinated two retreats away from the parish a year for the parishioners, and where her duties included spiritual direction programs and prayers at the retreats; (5) serving as the Master of Ceremonies and Cantor at liturgical services and main parish events during Holy Week; (6) serving as Eucharistic minister *and occasionally as a preacher giving homilies at the parish masses*; and (7) developing an arts ministry and writing bulletin articles, including for example, a series on different prayer experiences for people.

REASONS FOR DENYING THE PETITION

I. THE INSTANT CASE DOES NOT PRESENT COMPELLING REASONS FOR REVIEW ON A WRIT OF CERTIORARI.

In support of her Petition For Writ Of Certiorari, Petitioner O'Connor relies on Rule 10(b) of the Supreme Court of the United States, which states that one factor the Court may consider in determining whether compelling reasons exist for review on a writ of certiorari is whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of .. . a United States court of appeals." Rule 10(b). As set forth below, the Petition For Writ Of Certiorari should be denied because: (1) the federal circuit courts that have considered the question presented by Petitioner O'Connor, including the Ninth Circuit, have answered the question in the affirmative, and therefore there exists no conflict between a decision of a state court of last resort and a United States court of appeals; (2) the Ninth Circuit's narrow exception to the ministerial exception in claims of sexual harassment not involving employment decision-making are inapplicable to Petitioner O'Connor's claims for pregnancy-based sex and disability discrimination, and Petitioner O'Conner has waived any argument that it is applicable; (3) New York State's highest court has not addressed the application of the ministerial exception to claims arising under the New York City Charter and Administrative Code, Title VIII, § 8-107 *et seq.*, and (4) an independent and adequate state law basis exists for the New York State Supreme Court's dismissal of Petitioner O'Connor's Verified Complaint.

A. The Federal Circuit Courts That Have Addressed The Question Presented By Petitioner O'Connor, Including The Ninth Circuit, Have Held That The Ministerial Exception Bars Judicial Inquiry Into *Employment Decisions* Made By A Religious Organization Regarding A Minister, Regardless Of Whether The Decision Is Motivated By Religious Belief Or Doctrine.

Petitioner O'Connor has asked this Court to consider a single question: "[s]hould the ministerial exception to claims for employment discrimination protect a religious organization from liability for its own employment decision where the decision was not rooted in religious belief or doctrine." (Pet. at i). In arguing that the answer to this question is no, Petitioner O'Connor relies solely on the Ninth Circuit's decisions in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), *reh'g en banc denied*, 397 F.3d 790 (9th Cir. 2005), and *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999). Petitioner O'Connor's citation to *Elvig* and *Bollard* is misplaced since these cases uphold the widely accepted principal that a church's employment decisions concerning its ministers are protected by the Free Exercise Clause of the First Amendment of United States Constitution (hereinafter "Free Exercise Clause"), *regardless of whether the decision at issue is based upon religious belief or doctrine.* Accordingly, the Petition For Writ Of Certiorari should be denied since no conflict exists between a decision of a state court of last resort and a United States court of appeals.

The Free Exercise Clause restricts the government's ability to intrude into ecclesiastical matters or to interfere

with a church's governance of its own affairs.[5] *See, e.g., Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (explaining that the Free Exercise Clause protects the power of religious organizations "to decide for themselves, free from state interference, matters of church government *as well as those* of faith and doctrine.") (emphasis added); *see also Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) ("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether and whether the candidate possesses them"). The right of a religious organization to be free from state inference with church *governance* is separate from the First Amendment's prohibition of state adjudication of questions of religious faith and doctrine. *See Kedroff*, 344 U.S. at 116; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999). Accordingly, the Free Exercise Clause restricts *both* government encroachment on religious beliefs *and* government encroachment on the ability of a church to manage its own affairs.

To assure this constitutional prohibition of government interference in matters of church governance, federal courts have developed the ministerial exception to employment discrimination claims. The ministerial exception prohibits judicial interference into the employment relationship between religious organizations and their "ministers," with the term ministers being broadly defined to include all employees of a religious institution, whether ordained or not,

[5] The First Amendment of the United States Constitution states in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. Const. amend I.

whose primary functions serve the spiritual and pastoral mission of the church. *See Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (dismissing gender discrimination claim *by non-ordained pastoral associate* since the "ministerial exception to Title VII . . . does not depend on ordination but upon the function of the position"). The ministerial exception covers not only the initial selection of the minister, *but all other employment decisions such as the minister's salary, place of assignment and the duties he or she is to perform. See McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

Petitioner's citation to both *Bollard* and *Elvig* for the proposition that the ministerial exception does not apply to employment decisions unless they are based in religious belief or doctrine is misplaced. In *Bollard*, the Ninth Circuit considered whether the ministerial exception barred a claim for sexual harassment under Title VII brought by a novitiate in the Society of Jesus. In holding courts must "simply defer without further inquiry" into the defendant's employment decisions concerning a minister, the Ninth Circuit cited with approval to the Fifth Circuit's decision in *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999), stating:

> [W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church.

Bollard, 196 F.3d at 946-47, (citing *Combs*, 173 F.3d at 350). Critically, the Ninth Circuit also stated that "the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause *simply to require the church to articulate a religious justification for its personnel decisions*." 196 F.3d at 946 (emphasis added).

Similarly, in *Elvig* the Ninth Circuit considered whether the ministerial exception barred a Title VII sexual harassment suit brought by a former Associate Pastor of the Calvin Presbyterian Church. *Elvig*, 375 F.3d at 953. The court held that the plaintiff's allegations concerning the church's employment decisions, including the actions of removing certain of plaintiff's duties, suspending her, terminating her employment and refusing to permit her to circulate a resume, *were all barred* from judicial consideration because the ministerial exception protected the defendants' "unfettered freedom to take those actions without incurring Title VII liability." *Elvig*, 374 F.3d at 961, (citing *Bollard*, 196 F.3d at 947) ("Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church."). As in *Bollard*, the Ninth Circuit in *Elvig* held that it would not inquire into whether the reason for the employment action at issue was based religious doctrine. *Id.* at 961-62. After the *Elvig* decision, the Ninth Circuit reiterated this holding in *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1101-04 (9th Cir. 2005) (affirming dismissal of a disability discrimination claim pursuant to the ministerial exception, where a pastor of the United Methodist church claimed he

was forced to resign and that a hostile work environment was created when the church failed to make reasonable accommodations for his disabilities).

Like the Ninth Circuit in *Elvig* and *Bollard*, other courts have consistently held that the ministerial exception bars judicial inquiry into employment decisions between a church and its ministers, *without regard to whether the alleged discriminatory decision at issue is based on religious belief or doctrine. Combs*, 173 F.3d at 350 (5th Cir. 1999) (holding employment discrimination claims by ministers against their church necessarily require "secular authorities [to] intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal"); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (in rejecting Title VII claim by a non-ordained pastoral associate pursuant to the ministerial exception, the Court held that "the free exercise clause protects the act of a decision rather than the motivation behind it" . . . "the state may no more require a minimal basis in doctrinal reasoning than it may supervise doctrinal content."); *EEOC v. The Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795, 801 (4th Cir. 2000) (holding the ministerial "exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision."); *Alicea-Hernandez v. The Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2002) (in applying the ministerial exception, the court held that "[i]t is *not* our role to determine whether the church had a secular or religious reason for the alleged mistreatment of Alicea-Hernandez. The only question is that of the appropriate characterization of her position.") (emphasis added); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-63

(8th Cir. 1991); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000); *EEOC v. Catholic University of America*, 83 F.3d 455, 457-59 (D.C. Cir. 1996) (finding the University's failure to "assert any religious basis for denying Sister McDonough tenure does not affect our conclusion; nor does the fact that her application never reached ecclesiastical levels of review. The focus under the ministerial exception is on the action taken, not possible motives."); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989).

Since the federal circuit courts, including the Ninth Circuit, have overwhelmingly and consistently answered the question posed by Petitioner O'Connor in the affirmative, Respondents respectfully request that the Petition For Writ Of Certiorari be denied in its entirety.

B. The Narrow Holdings Of *Bollard* and *Elvig* Concerning The Inapplicability Of The Ministerial Exception To Title VII Sexual Harassment Claims Not Involving Employment Decisions Are Inapplicable To Petitioner O'Connor's Claims For Pregnancy-Based Sex And Disability Discrimination Under The NYCHRL.

As set forth above, the Ninth Circuit in *Bollard* and *Elvig* affirmed the principle that the ministerial exception prohibits courts from analyzing Title VII discrimination and harassment claims involving employment decisions rendered by a church, regardless of whether the decision was based on religious doctrine. At the same time, these cases also created a narrow exception to the application of the ministerial exception to Title VII sexual harassment claims

premised on allegations which are unrelated to employment decision-making. *See e.g. Bollard*, 196 F.3d at 947 (creating exception to ministerial exception for Title VII sexual harassment claim where plaintiff did not complain "that the Jesuits refused to ordain him or *engaged in any other adverse employment action*" such as the determination of his salary, his place of assignment, and the duties he was to perform). As set forth in detail below, Petitioner O'Connor cannot avail herself of this narrow exception since: (1) she has waived the argument, and (2) the exception does not apply to her claims for pregnancy-based sex and disability discrimination, which are premised on allegations of concerning employment decisions by Respondents that are protected by the ministerial exception.

1. Petitioner O'Connor Failed To Raise The Issue Of The *Bollard* and *Elvig* Exception To The New York State Courts Below.

It is well established that this Court has no jurisdiction to exercise its appellate power over state court judgments unless a federal question has been raised, presented and pursued in a timely manner at appropriate points in the state court proceedings. *See Godchaux Co. v. Estophinal*, 251 U.S. 179, 181 (1919). As set forth in Section A of the Statement Of The Case above, Petitioner O'Connor's arguments to the New York State courts that the ministerial exception does not apply to her claims in this action were based solely on her contentions that: (1) her job duties were primarily administrative and secular in nature, and (2) the ministerial exception does not apply to employment decisions that are not based on religious belief or doctrine. Petitioner has also failed to raise the *Bollard* and *Elvig* exception in her question presented to this court – "[s]hould the ministerial exception

to claims for employment discrimination protect a religious organization from liability for its own *employment decision* where the *decision* was not rooted in religious belief or doctrine." (emphasis added).

In sum, Petitioner O'Connor did not argue below that the narrow exception created by the Ninth Circuit in *Bollard* and *Elvig* to the ministerial exception is applicable to her claims for pregnancy-based sex and disability discrimination. Accordingly, Petitioner O'Connor has waived her right to raise this issue in connection with the instant Petition.

2. The Narrow Bollard and Elvig Exception To The Ministerial Exception Does Not Apply To Petitioner O'Connor's Pregnancy-Based Sex And Disability Claims Under The NYCHRL.

Assuming *arguendo* that Petitioner did raise the issue of the *Bollard* and *Elviq* exception below, the exception does not apply to Petitioner O'Connor's claims for pregnancy-based sex and disability discrimination under the NYCHRL. These city law discrimination claims are based on the following allegedly discriminatory *employment decisions*: (1) Respondent Modrys' decision to remove Petitioner O'Connor of her job title and job responsibilities as Chaplain, and Respondent Modrys' alleged statement to Petitioner O'Connor that he did not think she could do her job with two children; and (2) Respondent Modrys' decision to remove Petitioner O'Connor from her office on the second floor of the rectory and give it to a new full-time priest at the parish. These allegations constitute purportedly discriminatory employment decisions by Respondents that both *Bollard* and *Elvig* recognized are protected by the ministerial exception.

C. The New York State Court Of Appeals Has Not Addressed The Application Of The Ministerial Exception To Claims Arising Under The NYCHRL.

As noted in the Section A of the Statement Of The Case *supra*, the New York State Court Of Appeals denied Petitioner's motion for leave to appeal in this case. It did not affirm or otherwise render an any opinion concerning the merits of the Appellate Division's June 17, 2004 Decision And Order, nor has it rendered any opinion concerning application of the ministerial exception of which Respondents are aware.

Respondents recognize that this Court may grant a petition for a writ of certiorari when a state court of last resort has denied leave to appeal the decision of an intermediate state court. However, it is well established under New York law that "the denial of a motion for leave to appeal is not the equivalent of an affirmance and has no precedential value." *Matter of Conservative Party of the State of New York v. New York State Board of Elections*, 88 N.Y.2d 998, 648 N.Y.S.2d 868 (1996); *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 297-98 (1929) (Cardozo, Ch. J.). Accordingly, the question presented by Petitioner O'Connor in her Petition For Writ Of Certiorari has yet to be addressed by New York State's highest court, and therefore does not warrant this Court's attention at this time.

D. An Independent And Adequate State Law Basis Exists For Dismissing Petitioner O'Connor's Verified Complaint.

In dismissing Petitioner O'Connor's Verified Complaint in its entirety, the New York Supreme Court not only determined that the ministerial exception deprived the court of jurisdiction over Petitioner O'Connor's demotion and discharge claims, but also found that her allegations were insufficient to establish a *prima facie* case of discrimination as a matter of law, and that her allegations prior to May 10, 1998 were time-barred. (Pet. App. at A-2). Accordingly, since an independent and adequate state law basis exists for dismissing Petitioner's Verified Complaint, this Court should deny the Petition For Writ Of Certiorari. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.").

CONCLUSION

For all the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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